B. James Fitzpatrick (SBN: 129056)
bjfitzpatrick@fandslegal.com
Charles Swanston (SBN: 181882)
cswanston@fandslegal.com
Laura L. Franklin (SBN: 282642)
lfranklin@fandslegal.com
FITZPATRICK & SWANSTON
555 S. Main Street
Salinas, CA 93901
Telephone: (831) 755-1311
Facsimile: (831) 755-1319

Larry W. Lee (State Bar No. 228175)
lwlee@diversitylaw.com
Max W. Gavron (State Bar No. 291697)
mgavron@diversitylaw.com
DIVERSITY LAW GROUP, P.C.
515 S. Figueroa Street, Suite 1250
Los Angeles, CA 90071
(213) 488-6555
(213) 488-6554 facsimile

Attorneys for Plaintiffs
SIONE FUAPAU, ALFREDO GODINEZ, GABRIEL MENDOZA, MANUEL VACA, MICHAEL NAU, ANTONIO GUZMAN, JESUS GUERRERO, IVAN PACHECO, and MIGUEL REYES, JR.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SIONE FUAPAU, ALFREDO GODINEZ, GABRIEL MENDOZA, MANUEL VACA, MICHAEL NAU, ANTONIO GUZMAN, JESUS GUERRERO, IVAN PACHECO, and MIGUEL REYES, JR.,

Plaintiffs,

v.

LHOIST NORTH AMERICA OF ARIZONA, INC.; and DOES 1 through 50, inclusive,

Defendants.

Case No. 20-cv-04404-VKD

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS AND REPRESENTATIVE ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Date: September 13, 2022
Time: 10:00 A.M.
Courtroom: 2
Judge: Hon. Virginia K. DeMarchi

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 13, 2022, at 10:00 a.m., or as soon thereafter as the matter may be heard in Courtroom 2 of the United States District Court for the Northern District of California, San Jose Courthouse, located at 280 South 1st Street, San Jose, California 95113, before the Honorable Virginia K. DeMarchi, Plaintiffs Sione Fuapau, Alfredo Godinez, Gabriel Mendoza, Manuel Vaca, Michael Nau, Antonio Guzman, Jesus Guerrero, Ivan Pacheco, and Miguel Reyes, Jr. (collectively, "Plaintiffs") will and hereby do move the Court for an Order (1) granting final approval of the proposed class action settlement; and (2) approving Class Counsel's application for attorneys' fees in the amount of $80,000.00 (25% of the Class Settlement Amount) and reimbursement of costs in the amount of $15,845.29.

This Motion is based upon this Notice, the attached Memorandum of Points and Authorities, the accompanying Declarations of B. James Fitzpatrick, Laura L. Franklin, Larry W. Lee, Max W. Gavron, Sione Fuapau, Alfredo Godinez, Gabriel Mendoza, Manuel Vaca, Michael Nau, Antonio Guzman, Jesus Guerrero, Ivan Pacheco, Miguel Reyes, Jr., and Kevin Lee of Phoenix Settlement Administrators, any oral argument of counsel, the complete files and records in the above-captioned matter, and such additional matters as the Court may consider.

Date: August 4, 2022

FITZPATRICK & SWANSTON
DIVERSITY LAW GROUP

By: _____

B. James Fitzpatrick, Esq.
Larry W. Lee, Esq.
Attorneys for Plaintiffs
SIONE FUAPAU, ALFREDO GODINEZ, GABRIEL MENDOZA, MANUEL VACA, MICHAEL NAU, ANTONIO GUZMAN, JESUS GUERRERO, IVAN PACHECO, and MIGUEL REYES, JR.

TABLE OF CONTENTS

		Page
I.	INTRODUCTION	7
II.	LITIGATION HISTORY	7
III.	THE SETTLEMENT NOTICE PROCESS HAS BEEN DUTIFULLY ADHERED TO AND SUCCESSFULLY CARRIED OUT	9
IV.	THE SETTLEMENT	10
V.	THE SETTLEMENT EXCEEDS THE STANDARDS FOR FINAL APPROVAL	11
	A. The Strength of Plaintiffs' Case Supports Settlement	13
	B. Risks, Expense, and Duration of Continued Litigation Support Settlement	13
	C. The Settlement Amount Favors Settlement	14
	D. The Extent of Investigation Favors Settlement	15
	E. The Recommendations of Counsel Favor Approval of the Settlement	15
	F. The Class Has Responded Favorably to the Proposed Settlement	16
	G. Proposed Attorneys' Fee Award & Absence of Collusion	16
VI.	THE REQUESTED ATTORNEYS' FEES AND COSTS SHOULD BE APPROVED	17
	A. Percentage of the Fund	18
	B. The Lodestar Calculation "Cross-Check"	19
	1. Plaintiffs' Counsel's Lodestar is Reasonable	20
	C. The Court Should Approve the Request for Reimbursement of Costs	21
VII.	THE ADMINISTRATOR'S COSTS SHOULD BE APPROVED	21
VIII.	NOTICE TO THE LWDA	21
IX.	CONCLUSION	21

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Allen v. Bedolla, 787 F.3d 1218, 1223 (9th Cir. 2015) 12

Armstrong v. Board of Sch. Dirs., 616 F.2d 305, 325 (7th Cir. 1980) 15

Bellinghausen v. Tractor Supply Company, 306 F.R.D. 245, 258 (N.D. Cal. March 20, 2015) . 14, 16, 17, 18

Briseño v. Henderson, 998 F.3d 1014, 1031 (9th Cir. 2021) 12, 13, 16

Camilo v. Ozuna, 18-cv-02842-VKD, 2020 WL 1557423, at *21–22 (N.D. Cal. Apr. 1, 2020) 17, 18

Chavez v. Converse, Inc., No. 15-CV-03746-NC, 2020 WL 10575028, at *6 (N.D. Cal. Nov. 25, 2020) 18

Chun–Hoon v. McKee Foods Corp., 716 F. Supp. 2d 848, 851 (N.D. Cal. 2010) 13, 15, 16

Churchill Vill. LLC v. Gen. Elec., 361 F.3d 566, 577 (9th Cir .2004) 12, 16

Deaver v. Compass Bank, No. 13-cv-00222-JSC, 2015 WL 8526982, at *11–12 (N.D. Cal. Dec. 11, 2015) 18

Dyer v. Wells Fargo Bank, N.A., 2014 WL 5369395, at *3 (N.D. Cal. Oct. 22, 2014)... 13, 14, 15, 16

Emmons v. Quest Diagnostics Clinical Labs., Inc., No. 113CV00474DADBAM, 2017 WL 749018, at *7 (E.D. Cal. Feb. 27, 2017) 18

Fischel v. Equitable Life Assurance Soc'y of the U.S., 307 F.3d 997, 1007 (9th Cir. 2002) 18

Frank v. Gaos, 139 S. Ct. 1041 (2019) 19

In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 946 (9th Cir. 2011) ..... passim

In re Google Referrer Header Privacy Litig., 869 F.3d 737, 748 (9th Cir. 2017) 19

In re Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 459 (9th Cir. 2000) 15

In re Omnivision Techs., Inc., 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008) 16

Internal Improvement Fund Trs. v. Greenough, 105 U.S. 527, 532 (1881) 17

Kim v. Allison, 8 F.4th 1170, 1178 (9th Cir. 2021) 12, 13, 16

Magadia v. Wal-Mart Assocs., Inc., 384 F. Supp. 3d 1058 (N.D. Cal. 2019) 19

Magadia v. Wal-Mart Assocs., Inc., 999 F.3d 668 (9th Cir. 2021) 19

Miguel-Sanchez v. Mesa Packing, LLC, No. 20-CV-00823-VKD, 2021 WL 4893394, at *4 (N.D.

Cal. Oct. 20, 2021) 9

Moore v. PetSmart, Inc., No. 5:12-cv-03577-EJD, 2015 WL 5439000, at *11 (N.D. Cal. Aug. 4, 2015) 18

Moore v. Verizon Commc'ns Inc., 2013 WL 4610764, at *5 (N.D. Cal. Aug. 28, 2013) 13

Ontiveros v. Zamora, 303 F.R.D. 356, 371 (E.D. Cal. Oct. 8, 2014) 15

Pallas v. Pacific Bell, 1999 WL 1209495, at *6 (N.D. Cal. July 13, 1999) 16

Rivas v. BG Retail, LLC, No. 16-cv-06458-BLF, 2020 WL 264401, at *8 (N.D. Cal. Jan. 16, 2020) 18

Rodriguez v. Nike Retail Servs., Inc., 928 F.3d 810, 818 (9th Cir. 2019) 19

Roes, 1–2 v. SFBSC Mgmt., 944 F.3d 1035, 1046 n.7 (9th Cir. 2019) 9, 10, 12

Smith v. American Greetings Corp., 14-cv-02577-JST, 2016 WL 362395, at *8–9 (N.D. Cal. Jan. 29, 2016) 18

Staton v. Boeing Co., 327 F.3d 938, 952 (9th Cir. 2003) 12, 18

Uschold v. NSMG Shared Servs., 2020 WL 3035776, at *29 (N.D. Cal. 2020) 14, 15

Villalpando v. Exel Direct Inc., No. 12-cv-04137-JCS, 2016 WL 7740854, *1, *2 (N.D. Cal. Dec. 12, 2016) 18

State Cases

Ketchum vs. Moses, 24 Cal. 4th 1122, 1133 (2001) 21

Laffitte v. Robert Half Int'l, 1 Cal. 5th 480, 503 (2016) 18

Vo v. Las Virgenes Municipal Water Dist., 79 Cal. App. 4th 440, 447 (2000) 21

Statutes

28 U.S.C. § 1441 8

28 U.S.C. § 1446 8

Business and Professions Code § 17200, *et seq* 8, 10

Labor Code § 1174 ..... 8, 10

Labor Code § 1175 ..... 8, 10

Labor Code § 1194 ..... 8, 10

Labor Code § 1198 ..... 8, 10

Labor Code § 1199 10

Labor Code § 201 10

Labor Code § 202 10
Labor Code § 203 10
Labor Code § 204 ..... 8, 10
Labor Code § 216 ..... 8, 10
Labor Code § 218 ..... 8, 10
Labor Code § 218.5 ..... 10, 21
Labor Code § 218.6 10
Labor Code § 221 ..... 8, 10
Labor Code § 223 ..... 8, 10
Labor Code § 226 ..... 8, 10
Labor Code § 226(e) 21
Labor Code § 226.3 10
Labor Code § 226.7 ..... 8, 10
Labor Code § 2698 8
Labor Code § 2699(g)(1) 21
Labor Code § 2800 10
Labor Code § 2802 ..... 8, 10
Labor Code § 510 10
Labor Code § 512 10
Labor Code § 558 10

Other Authorities

4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11.45 (4th ed. 2002) 14

Rules

Fed. R. Civ. P. 23 10
Fed. R. Civ. P. 23(c)(2) 9
Fed. R. Civ. P. 23(e) 11, 12
Fed. R. Civ. P. 23(e)(2) 12

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

By this motion, Plaintiffs Sione Fuapau, Alfredo Godinez, Gabriel Mendoza, Manuel Vaca, Michael Nau, Antonio Guzman, Jesus Guerrero, Ivan Pacheco, and Miguel Reyes, Jr. (collectively, "Plaintiffs") seek final approval of a substantial class-wide settlement reached between Plaintiff and Defendant Lhoist North America of Arizona, Inc. ("Defendant") (together, Plaintiffs and Defendant referred to as the "Parties"). On May 11, 2022, the Court entered an Order Granting Plaintiffs' Motion for Preliminary Approval of Class and Representative Action Settlement (Dkt. Nos. 63 and 64) ("Preliminary Approval Order"). The Parties now seek this Court's final approval of the settlement.

Plaintiffs also seek an order approving Class Counsel's application for attorneys' fees in the amount of $80,000.00 (25% of the class settlement amount of $320,000.00 ("Class Settlement Amount")) and reimbursement of litigation costs in the amount of $15,845.29. The Parties detailed the terms of the settlement in the Notice of Class and Representative Action Settlement ("Notice Packet"), which was mailed to all Class Members.

The settlement requires Defendant to pay a total of Three Hundred Twenty Thousand Dollars ($320,000.00), a sum which represents a substantial recovery for the members of the Class. This settlement is non-reversionary, such that no monies will revert to Defendant. (Settlement Agreement ¶¶ 9, 15, 50.) As such, there was no claims process involved. Class Members were given an opportunity to object or opt-out of the settlement. To date, there have been zero (0) opt outs and zero (0) objections to the settlement. (Declaration of Kevin Lee ("K. Lee Decl.") ¶¶ 8, 9.) This shows that the overwhelming majority of Class Members have reacted favorably to the settlement as there is a **100% participation rate and not a single objection from the 116 member class**. This favorable response supports approval and Plaintiffs' request that the Court grant this Motion and enter judgment accordingly.

II. LITIGATION HISTORY

On March 5, 2020, Plaintiffs filed a class and representative action complaint against Defendant in the Superior Court of California, County of Monterey, alleging the following

causes of action: (1) violation of Labor Code §§ 226.7 and 1198, for failure to provide meal periods; (2) violation of Labor Code §§ 226.7 and 1198, for failure to provide rest periods; (3) violation of Labor Code §§ 1194 and 1198, for failure to pay hourly and overtime wages; (4) violation of Labor Code §§ 226, 1174, and 1175, for failure to comply with itemized wage statement and records requirements; (5) violation of Labor Code §§ 204, 216, 218, 221, 223, 1194, and 1198, for failure to pay agreed wages; (6) violation of Labor Code § 204, for failure to pay wages in a timely manner; (7) violation of Labor Code § 2802, for failure to reimburse work related expenses; (8) violation of Labor Code § 2698, the Private Attorneys General Act ("PAGA"), for penalties; and (9) violation of Business and Professions Code § 17200, *et seq*., for unfair business practices. (Dkt. No. 1, Ex. A.)

On July 1, 2020, Defendant filed a Notice of Removal of Action to Federal Court pursuant to 28 U.S.C. §§ 1441, 1446. (Dkt. No. 1.) Plaintiffs subsequently filed a First Amended Complaint on July 24, 2020, adding a class claim for violation for Labor Code § 226 and individual causes of action for retaliation and wrongful termination on behalf of Gabriel Mendoza. (Dkt. No. 15.)

On October 20, 2021, Plaintiffs filed a Second Amended Complaint, modifying Plaintiffs' dates of employment and asserting additional class claims. (Dkt. No. 43.) The Second Amended Complaint is the operative Complaint ("Complaint").

With respect to investigation and discovery, Plaintiffs conducted extensive investigation of the facts surrounding the claims in this action before filing suit, as well as during the course of litigating and prosecuting this case. (Declaration of Max W. Gavron ("Gavron Decl.") ¶ 2.) The Parties served their Initial Disclosures and propounded and responded to written discovery, including interrogatories and requests for production of documents. (*Id*. ¶ 2.) Plaintiffs also took the deposition of Defendant's FRCP 30(b)(6) witness regarding payroll policies and procedures and engaged in further investigation, leading to the filing of a motion for class certification. (*Id*. ¶ 2.) In connection with two mediations, Plaintiffs also obtained and reviewed information regarding the number of employees in the putative class and the number of payroll periods at issue. (*Id*. ¶ 2.)

On February 26, 2021, the Parties attended a mediation with respected mediator, Michael Loeb, Esq. While the Parties were unable to reach an agreement, they continued to meet and confer and ultimately conducted a second mediation with Mr. Loeb on September 1, 2021. (Gavron Decl. ¶ 3.) As a result of subsequent arm's length negotiations following mediation, the Parties were able to reach a settlement of all terms. (*Id.*)

On May 11, 2022, the Court granted preliminary approval. (Dkt. Nos. 63-64.)

III. THE SETTLEMENT NOTICE PROCESS HAS BEEN DUTIFULLY ADHERED TO AND SUCCESSFULLY CARRIED OUT

As noted above, preliminary approval was granted on May 11, 2022. At that time, Phoenix Settlement Administrators ("Claims Administrator") was appointed by the Court as the Claims Administrator. The Parties, through the work of the Claims Administrator, have complied with this Court's orders concerning dissemination of the class notice. (K. Lee Decl. ¶¶ 2-5.)

The notice was mailed to the class of 116 individuals utilizing the data provided by Defendant. (K. Lee Decl. ¶ 5.) Of those, none were returned with an invalid address and thus none were considered undeliverable. (*Id.* ¶¶ 6-7.) Pursuant to the Court's Preliminary Approval Order, because none of the notices were considered undeliverable, Phoenix did not provide notice via email. Dkt. No. 64, pg. 5 ("If a valid mailing address cannot be identified, the Claims administrator will email the notice."). The Ninth Circuit has held "that neither due process nor Rule 23's standard necessarily require actual notice," *Roes, 1–2 v. SFBSC Mgmt.*, 944 F.3d 1035, 1046 n.7 (9th Cir. 2019), and parties are not required to implement all potential options in every case, *id.* at 1047. Accordingly, the notice provided here exceeds the standards set forth by Rule 23(c)(2). *See Miguel-Sanchez v. Mesa Packing, LLC*, No. 20-CV-00823-VKD, 2021 WL 4893394, at *4 (N.D. Cal. Oct. 20, 2021) (approving of notice where "Ultimately, 613 class members, or 87.7% of the class, received actual notice of the proposed settlement.").

As noted in the Declaration of Kevin Lee, on June 27, 2022, Phoenix received contact from the wife/spouse of a putative class member who purported to request to be excluded on behalf of the deceased class member. (Kevin Lee Decl., ¶ 8 n. 1.) Phoenix reached out to obtain

a copy of the death certificate to confirm she was executor of the estate, but the wife/spouse shared that she would not be sending a copy of the death certificate/further documentation to confirm that she had power of attorney. *Id.* After conferring with counsel for the Parties, Phoenix calculated the proposed distributions assuming that the request for exclusion would not be accepted. *Id.* While counsel was unable to find legal authority addressing this particular scenario, the notice provided and determination not to accept the request for exclusion comports with due process, Rule 23, and the terms of the settlement agreement. *See SFBSC Mgmt.*, 944 F.3d at 1046 n.7 (discussing fact that actual notice is not required); Settlement Agreement ¶ 44.

IV. THE SETTLEMENT

The settlement terms were summarized in detail in the Motion for Preliminary Approval, and Plaintiffs respectfully incorporate those arguments herein to avoid unnecessary duplication. The specific terms of the settlement are set forth in the Settlement Agreement and the Preliminary Approval Order. (Dkt. No. 51-1 at Exhibit A; and Dkt. Nos. 63 and 64.) The principal terms are:

a. The Class is defined as "All current and former non-exempt employees of Defendant who worked in the State of California at any time during the Class Period (October 20, 2017, through November 15, 2021).

b. The Class is releasing:

> any and all claims, rights, demands, liabilities, and causes of action based on the same set of operative facts as those set forth in the operative Second Amended Complaint, including but not limited to claims based on the following categories of allegations: All claims for violation of Labor Code §§ 201, 202, 203, 204, 216, 218, 218.5, 218.6, 221, 223, 226, 226.3, 226.7, 510, 512, 558, 1174, 1175, 1194, 1198, 1199, 2800, and 2802, and Business and Professions Code § 17200, *et seq*.**Error! Bookmark not defined.**, and all applicable IWC Wage Orders for failure to provide proper meal and rest breaks and/or pay meal and rest period premiums at the regular rate of pay, pay all overtime wages owed, pay all agreed wages and minimum wage, furnish accurate wage statements, reimburse business expenses, pay all wages in a timely manner and upon separation of employment, and unfair business practices.

c. Defendant will pay a total Class Settlement Amount of $320,000.00. This sum includes payments made to the Participating Class Members, claims administration costs, award of attorneys' fees and costs, and payment to the LWDA.

d. The sum available for use as payments to Class Members after the claims administration costs, award of attorneys' fees and costs, and payment to the LWDA shall be referred to as the Net Settlement Amount. Defendant agrees that it shall pay the entirety (100%) of the Net Settlement Amount. **In other words, the settlement is non-reversionary, meaning that no funds will revert to Defendant.**

e. No claim forms were necessary for any Class Member to participate in the settlement and receive their share of the settlement. Thus, any Class Member who did not opt-out in connection with this settlement will automatically receive his/her share of the settlement proceeds. On average, each Class Member will receive approximately a payment of $1,706.08.[1] (K. Lee Decl. ¶ 14.) The highest individual settlement payment to be paid will be approximately $2,757.98. (*Id.*)

f. Any remaining monies from uncashed checks will be paid to Watsonville Law Center, as a *cy pres* beneficiary.

g. All of this Court's orders in connection with the claims administration process have been followed. (*See generally* K. Lee Decl. filed herewith).

The settlement represents a compromise between the positions and evaluations of the two sides to this controversy. Clearly, there were significant disagreements between the Parties as to the facts and the law.

V. THE SETTLEMENT EXCEEDS THE STANDARDS FOR FINAL APPROVAL

Federal Rule of Civil Procedure 23(e) provides that any compromise of a class action must receive Court approval. *See* Fed. R. Civ. P. 23(e) ("The claims, issues, or defenses of a

[1] The Declaration of Kevin Lee provides the anticipated distribution of the settlement for two scenarios. Because the Settlement Agreement originally provided for up to 1/3 of the settlement to be allocated to attorneys' fees, he details the proposed distribution under that scenario. However, Plaintiffs' counsel moves for attorneys' fees of 25% of the settlement, which results in a higher portion of the settlement being distributed to the Class. The amounts referenced here and throughout the brief contemplate the 25% fee award.

certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval."). The Ninth Circuit has repeatedly noted that a strong judicial policy favors settlement of Rule 23 class actions. *Briseño v. Henderson*, 998 F.3d 1014, 1031 (9th Cir. 2021) (quoting *Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th Cir. 2015)). However, no broad presumption of fairness applies to such settlements. *SFBSC Mgmt., LLC*, 944 F.3d at 1049. And where the parties reach a settlement before class certification, courts must "employ[ ] extra caution and more rigorous scrutiny," *id.*, and "peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement," *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003); *see also In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) ("Prior to formal class certification, there is an even greater potential for a breach of fiduciary duty owed the class during settlement. Accordingly, such agreements must withstand an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required under Rule 23(e) before securing the court's approval as fair.").

In the Ninth Circuit, "a district court examining whether a proposed settlement comports with Rule 23(e)(2) is guided by the eight '*Churchill* factors.'" *Kim v. Allison*, 8 F.4th 1170, 1178 (9th Cir. 2021) (citations omitted). These *Churchill* factors include:

> (1) The strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members of the proposed settlement.

Bluetooth, 654 F.3d at 946 (citing *Churchill Vill.*, 361 F.3d at 576–77).

"[C]onsideration of these eight *Churchill* factors alone is not enough to survive appellate review." *Kim*, 8 F. 4th at 1179 (citation omitted). The Ninth Circuit recently held that Rule 23(e)(2), as revised in 2018, requires courts "to go beyond our precedent" by accounting for the terms of any proposed award of attorneys' fees when determining whether the relief provided for the class is adequate. *Briseño*, 998 F.3d at 1023–26; *see also Kim*, 8 F.4th at 1179. Specifically, in reviewing settlements struck both before and after class certification, "district courts must

apply *Bluetooth's* heightened scrutiny" to examine whether the attorneys' fee arrangement shortchanges the class. *Id.* at 1023–25. The *Bluetooth* court identified three signs of such shortchanging: (1) class counsel's receipt of a disproportionate distribution of the settlement; (2) a "clear sailing" agreement "providing for the payment of attorneys' fees separate and apart from class funds"; and (3) an arrangement whereby fees that awarded are reverted to the defendants, rather than added to the class fund. 654 F.3d at 947. Plaintiffs address each of these factors below.

A. The Strength of Plaintiffs' Case Supports Settlement

This factor is generally satisfied when plaintiffs must overcome barriers to make their case. *Chun-Hoon v. McKee Foods Corp*., 716 F. Supp. 2d 848, 851 (N.D. Cal. 2010). As noted above, while Plaintiffs believe that the Class could be certified and that there is ample case law to support Plaintiffs' contentions in this matter, there was no guarantee. Plaintiffs detailed the potential hurdles to the Court in the Motion for Preliminary Approval and Supplemental briefing, which included Defendant's arguments regarding preemption of many of the claims asserted, its compliant written wage and hour policies, potential impediments to class certification, existence of collective bargaining agreements, waivers, and releases. Therefore, this factor favors settlement. *See Dyer v. Wells Fargo Bank, N.A.*, 2014 WL 5369395, at *3 (N.D. Cal. Oct. 22, 2014) (factor favors final approval where "[p]laintiffs acknowledge that, if the settlement is not approved, they will encounter significant obstacles in establishing their claims"); *see also Moore v. Verizon Commc'ns Inc.*, 2013 WL 4610764, at *5 (N.D. Cal. Aug. 28, 2013) (finding that the relative strength of plaintiffs' case favored settlement because plaintiffs admitted they would face hurdles in proving liability and damages).

B. Risks, Expense, and Duration of Continued Litigation Support Settlement

"Difficulties and risks in litigating weigh in favor of approving a class settlement." *Dyer*, 2014 WL 5369395, at *3 (citation omitted). In addition to the obstacles set forth above, even if Plaintiffs had prevailed at trial, there was a likelihood that Defendant would have appealed the verdict. Thus, the risks, expense, and duration of continued litigation favor final approval of the settlement. *See Dyer*, 2014 WL 5369395, at *3 ("This factor supports final approval of this

settlement because, without a settlement, Plaintiffs would risk recovering nothing after a lengthy and costly litigation.").

C. The Settlement Amount Favors Settlement

The standard of review for class settlements is whether the settlement is within a range of reasonableness. As Professor Newberg comments: "Recognizing that there may always be a difference of opinion as to the appropriate value of settlement, the courts have refused to substitute their judgment for that of the proponents. Instead the courts have reviewed settlements with the intent of determining whether they are within a range of reasonableness.…" 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11.45 (4th ed. 2002). As detailed in Plaintiff's Motion for Preliminary Approval, Supplemental Briefing submitted in support thereof, and the Court's Order granting preliminary approval, the settlement is in the range of reasonableness when compared to the potentially available penalties, risk in moving forward with litigation, and the possibility of appeals. *See* Dkt. Nos. 51, 59, 63, 64.

Plaintiffs estimated that the settlement amount represents approximately 11.65% of the potential recovery, which is fair, adequate, and reasonable considering the potential hurdles to a favorable verdict. *See, e.g., Uschold v. NSMG Shared Servs.*, 2020 WL 3035776, at *29 (N.D. Cal. 2020) (approving settlement where net settlement amount reflected a 12% recovery of potential damages).

The settlement fund is non-reversionary, such that 100% of the Net Settlement Amount will be available for distribution to Class Members who do not opt-out. Moreover, the settlement did not require claim forms. Rather, Class Members who did not opt-out will receive a check. Further, the settlement fund will be paid out entirely in cash (as opposed to a voucher, coupon, etc.). Here, not a single objection was filed, which further supports the reasonableness of the settlement amount. *Bellinghausen v. Tractor Supply Company*, 306 F.R.D. 245, 258 (N.D. Cal. March 20, 2015) ("Courts have repeatedly recognized that an absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of the proposed class settlement action are favorable to the class members.").

//

D. The Extent of Investigation Favors Settlement

Here, settlement was reached following years of litigation and motion practice, including the exchange of Initial Disclosures and written discovery, taking the deposition of Defendant's FRCP 30(b)(6) witness regarding payroll policies and procedures, and Plaintiff moving for class certification. Counsel for the Parties also engaged in a meet and confer process regarding the data necessary to perform a damage analysis and engage in a meaningful mediation. (Gavron Decl. ¶ 2.) In connection with two mediations, Defendants provided certain class payroll data for Plaintiffs to review and analyze. (*Id*.)

Courts have held that such discovery is sufficient for parties to make an informed decision regarding the adequacy of the settlement. *See*, *e.g*., *Dyer*, 2014 WL 5369395, at *3 (parties' participation in written discovery, depositions, witness interviews, and formal mediation favors an informed settlement); *Chun-Hoon*, 716 F. Supp. 2d at 848 ("true value of the class claims is well-known and class counsel possess a sufficient understanding of the issues involved and the strengths and weaknesses of the case"); *see also In re Mego Fin. Corp. Sec. Litig*., 213 F.3d 454, 459 (9th Cir. 2000) (formal discovery not necessary where the parties have sufficient information to make an informed decision about settlement).

E. The Recommendations of Counsel Favor Approval of the Settlement

The recommendations of experienced counsel should be given considerable weight. "The court gives considerable weight to class counsel's opinions regarding the settlement due to counsel's experience and familiarity with the litigation." *Uschold*, 2020 WL 3035776, at *32–33 (N.D. Cal. 2020) (finding counsel's assertion that the settlement was fair, adequate, and reasonable supported final approval of the settlement, where counsel had extensive experience litigating wage-and-hour class actions); *Ontiveros v. Zamora*, 303 F.R.D. 356, 371 (E.D. Cal. Oct. 8, 2014) (same).

Counsel for Plaintiffs have broad experience litigating employment class actions. (Declaration of B. James Fitzpatrick ("Fitzpatrick Decl.") ¶ 4; Declaration of Laura L. Franklin ("Franklin Decl.") ¶¶ 8, 9; Declaration of Larry W. Lee ("Lee Decl.") ¶¶ 6-10; Gavron Decl. ¶¶ 9-14.) They support this settlement as a fair and reasonable settlement which is in the best

interest of the settlement class. (Fitzpatrick Decl. ¶ 9; Franklin Decl. ¶ 2; Lee Decl. ¶ 5; Gavron Decl. ¶ 5.) Therefore, this factor favors approval of the settlement. *See Dyer*, 2014 WL 5369395, at *3 (recommendation of plaintiffs' counsel supports approval of settlement); *Chun-Hoon*, 716 F. Supp. 2d at 848 (same). Plaintiffs also support the settlement. (*See generally* Declarations of Sione Fuapau, Alfredo Godinez, Gabriel Mendoza, Manuel Vaca, Michael Nau, Antonio Guzman, Jesus Guerrero, Ivan Pacheco, and Miguel Reyes, Jr.)

F. The Class Has Responded Favorably to the Proposed Settlement

"[T]he absence of a large number of objections to a proposed class action settlement raises a strong presumption that" the settlement is favorable to class members. *In re Omnivision Techs., Inc*., 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008), *see Pallas v. Pacific Bell*, 1999 WL 1209495, at *6 (N.D. Cal. July 13, 1999) ("The greater the number of objectors, the heavier the burden on the proponents of settlement to prove fairness.").

Here, **not a single Class Member out of 116 individuals has objected** to this settlement and **no Class Members have opted out**. (K. Lee Decl. ¶¶ 8, 9.) In other words, this settlement has a 100% participation rate. Thus, the absence of any objections or opt-outs strongly support the fairness of the settlement. *See Churchill Vill. LLC v. Gen. Elec.*, 361 F.3d 566, 577 (9th Cir. 2004) (approving settlement with 45 objections and 500 opt-outs from a 90,000-person class, representing .05% and .56% of the class, respectively); *Dyer*, 2014 WL 5369395, at *4 (strong support from class in favor of approving settlement where only three of 8,695 class members opted out); *Bellinghausen*, 306 F.R.D. at 258.

G. Proposed Attorneys' Fee Award & Absence of Collusion

As directed by the Ninth Circuit in *Briseño* and *Kim*, the Court should account for the terms of the proposed attorneys' fee award when determining whether the relief provided for the class is adequate. 998 F.3d at 1023–26; 8 F.4th at 1179. Specifically, the Court must examine the attorneys' fee arrangement for the three signs of collusion identified by the Ninth Circuit in *Bluetooth* and described above. *Briseño*, 998 F.3d at 1023–25 (citing *Bluetooth*, 654 F.3d at 947).

Bluetooth Factor 1: While the Settlement Agreement provided for up to 1/3 of the gross

settlement amount as attorneys' fees, Plaintiffs' counsel only requests 25%, or $80,000.00. The proposed attorneys' fees of $80,000.00 amounts to approximately 40% of the actual payout to the class ($80,000.00 / $197,904.71 = 40.42%). Courts routinely find a proportion in this range does not indicate collusion. *See Camilo v. Ozuna*, 18-cv-02842-VKD, 2020 WL 1557423, at *21–22 (N.D. Cal. Apr. 1, 2020) (court "not prepared to say" that class counsel's request in fees, about 52% of the actual total payout to class, was a sign of collusion); *Bellinghausen*, 306 F.R.D. at 258–59 (where amount of attorneys' fees requested was 38.5% of total actual payout to class, such request was "reasonable").

Bluetooth Factor 2: While the Settlement Agreement included a provision that Defendant would not oppose a fee request of up to 1/3 of the gross settlement amount, Plaintiffs' counsel has requested only 25%. Accordingly, on balance, this factor demonstrates no collusion.

Bluetooth Factor 3: The Settlement Agreement does not permit any of the settlement amount to revert to Defendant and thus this factor weighs in favor of approval.

Analysis of the factors above, demonstrates that the settlement is fair, adequate, and reasonable.

VI. THE REQUESTED ATTORNEYS' FEES AND COSTS SHOULD BE APPROVED

"The Ninth Circuit has approved two methods of determining attorneys' fees in cases where, as here, the amount of the attorneys' fee award is taken from the common fund set aside for the entire settlement: the 'percentage of the fund' method and the 'lodestar' method." *Bellinghausen*, 306 F.R.D. at 259–60 (citing *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002)). "The district court retains discretion in common fund cases to choose either method," *id.*, but the Ninth Circuit recommends that district courts apply one method, using the other to cross-check the appropriateness of the amount of requested attorneys' fees. *See Bluetooth*, 654 F.3d at 944. "Under either approach, '[r]easonableness is the goal, and mechanical or formulaic application of either method, where it yields an unreasonable result, can be an abuse of discretion.'" *Bellinghausen*, 306 F.R.D. at 260 (quoting *Fischel v. Equitable Life Assurance Soc'y of the U.S.*, 307 F.3d 997, 1007 (9th Cir. 2002)).

//

A. Percentage of the Fund

Generally, an attorneys' fee award of 25%, which is what Plaintiffs request here, is the benchmark. *Bluetooth*, 654 F.3d at 947; *Staton*, 327 F.3d at 952; *see Rivas v. BG Retail, LLC*, No. 16-cv-06458-BLF, 2020 WL 264401, at *8 (N.D. Cal. Jan. 16, 2020) (approving attorneys' fees totaling 45% of the settlement fund); *Smith v. American Greetings Corp.*, 14-cv-02577-JST, 2016 WL 362395, at *8–9 (N.D. Cal. Jan. 29, 2016) (approving attorneys' fees totaling 28% of the settlement fund); *Deaver v. Compass Bank*, No. 13-cv-00222-JSC, 2015 WL 8526982, at *11–12 (N.D. Cal. Dec. 11, 2015) (approving attorneys' fees totaling 33% of the settlement fund); *Moore v. PetSmart, Inc.*, No. 5:12-cv-03577-EJD, 2015 WL 5439000, at *11 (N.D. Cal. Aug. 4, 2015) (approving attorneys' fees totaling 27% of the settlement fund). Courts also often award even award higher percentages in diversity cases relying on state law. *See, e.g., Emmons v. Quest Diagnostics Clinical Labs., Inc*., No. 113CV00474DADBAM, 2017 WL 749018, at *7 (E.D. Cal. Feb. 27, 2017) (following *Laffitte v. Robert Half Int'l*, 1 Cal. 5th 480, 503 (2016) in awarding 33% of the common fund; "[t]he California Supreme Court recently held that the percentage-of-fund method of calculating attorneys' fees survives in California courts"); *Chavez v. Converse, Inc.*, No. 15-CV-03746-NC, 2020 WL 10575028, at *6 (N.D. Cal. Nov. 25, 2020); *Villalpando v. Exel Direct Inc.*, No. 12-cv-04137-JCS, 2016 WL 7740854, *1, *2 (N.D. Cal. Dec. 12, 2016) (awarding 1/3).

Here, the degree of success obtained in this settlement also supports approval of a 25% award. *See Camilo*, 2020 WL 1557428, at *17 (net settlement was 44% of defendants' potential liability); *Rivas*, 2020 WL 264401, at *5 (2.4% net recovery to the class was not reason to reject the settlement). "The existence or absence of objectors to the requested attorneys' fee is a factor in determining the appropriate fee award." *Bellinghausen*, 306 F.R.D. at 261 (citation omitted). Here, there is 100% participation by the class members, and no objections. The reasonableness is further bolstered because the class notice provided to class members provided estimated distributions contemplating a 1/3 of the gross settlement being awarded as attorneys' fees. Therefore, the amount class members will receive will actually increase from the notice they received considering the 25% fee request, and lower amount of costs.

Plaintiffs' attorneys heavily and aggressively litigate numerous wage and hour class actions on behalf of workers throughout the State of California – all cases of which are on a contingency fee basis. *See*, *e.g.*, *Rodriguez v. Nike Retail Servs., Inc*., 928 F.3d 810, 818 (9th Cir. 2019); *Magadia v. Wal-Mart Assocs., Inc*., 384 F. Supp. 3d 1058 (N.D. Cal. 2019). For example, in *Magadia*, Plaintiff's counsel litigated that case for several years, including trying the case to a successful $102 million judgment on behalf of the class. Walmart successfully appealed and Plaintiff's counsel have not been reimbursed for any attorneys' fees or costs. *See Magadia v. Wal-Mart Assocs., Inc.*, 999 F.3d 668 (9th Cir. 2021). As such, employment class actions present significant risks. Nevertheless, Plaintiffs' counsel zealously represent workers notwithstanding the potential for losing cases, or not being reimbursed attorneys' fees and costs for years of tireless litigation.

B. The Lodestar Calculation "Cross-Check"

Although not required, the Court may also conduct a lodestar analysis to cross-check the reasonableness of the fee award. *In re Google Referrer Header Privacy Litig.*, 869 F.3d 737, 748 (9th Cir. 2017) (noting that lodestar analysis not required), *vacated on other grounds by Frank v. Gaos*, 139 S. Ct. 1041 (2019). "The lodestar figure is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the experience of the lawyer." *Bluetooth*, 654 F.3d at 941. The Court may increase or decrease the lodestar by a multiplier that reflects factors such as "the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment." *Id.* at 942.

The declarations of Class Counsel evidence the fact that they devoted approximately 304.5 hours of time to this litigation to date. (Fitzpatrick Decl. ¶ 3, Ex. A; Gavron Decl. ¶ 16, Ex. A.) These hours are summarized in the time and task charts that are attached to Plaintiffs' counsel's declarations.

In addition, as explained above, Class Counsel expect to expend an additional 10 hours through the final approval hearing, including on matters such as preparing the Motion for Final

Approval, attending the final approval hearing, and further conferring with class members regarding the case status. (Gavron Decl. ¶ 17.) Thus, Class Counsel will have expended 314.5 hours through final approval.

Applying the various hourly rates of the law firms and lawyers who dedicated their efforts to this matter, a lodestar of $197,407.50 is established for the amount of work spent through final approval. (Fitzpatrick Decl. ¶ 3, Ex. A; Gavron Decl. ¶ 16, Ex. A.) The percentage award sought by Class Counsel, if converted to the lodestar method, would entail a negative multiplier of approximately 0.41. In the Ninth Circuit, positive multipliers "ranging from one to four are frequently awarded…when the lodestar method is applied." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 n. 6 (9th Cir. 2002). Thus, the fee application is supported whether by the cross-check lodestar/multiplier method discussed herein, or by the percentage of the common fund discussed in the preceding sections.

1. Plaintiffs' Counsel's Lodestar is Reasonable

The hourly rates employed by Class Counsel, as declared to in the attorney declarations, are reasonable. Plaintiffs' attorneys are entitled to the hourly rates charged by attorneys of comparable experience, reputation, and ability for similar litigation. The background and experience of Plaintiffs' counsel are fully set forth in the declarations filed in support of this motion. The basic hourly rates listed for each firm are fair, and representative of the combination of years of experience and the clear successes they have had in the past in connection with class action litigation. The time and task charts summarize the total hours devoted to the matter by the various law firms, along with the hourly rates as set forth in the supporting declarations, and the total billed. (Fitzpatrick Decl. ¶ 3, Ex. A; Gavron Decl. ¶ 16, Ex. A.)

As discussed in their supporting declarations, Class Counsel are a group of well-experienced litigators, including class action litigation. (Fitzpatrick Decl. ¶ 4; Franklin Decl. ¶ 8, 9; Lee Decl. ¶¶ 6-10; Gavron Decl. ¶¶ 9-15.) Under California law, counsel are entitled to compensation for all hours reasonably spent on the matter. *Ketchum vs. Moses*, 24 Cal. 4th 1122, 1133 (2001). Reasonableness of hours is assessed by "the entire course of the litigation, including pretrial matters, settlement negotiations, discovery, litigation tactics, and the trial

itself…." *Vo v. Las Virgenes Municipal Water Dist*., 79 Cal. App. 4th 440, 447 (2000). In addition, the attached time and task charts clearly reflect the many hours which were necessarily spent on the case.

C. The Court Should Approve the Request for Reimbursement of Costs

The request for reimbursement of costs, in the amount of $15,845.29 is fair and reasonable. As stated above, the costs are all litigation related costs, which have been detailed in the supporting declaration of Class Counsel. (Fitzpatrick Decl. ¶ 7, Ex. B; Lee Decl. ¶ 11, Ex. A.) The authority for the Court to award costs is the Parties' Settlement Agreement and Labor Code §§ 218.5, 226(e), and 2699(g)(1). The actual costs sought by Plaintiffs' counsel are much less than those originally contemplated by the settlement agreement ($25,000.00). The difference will revert to the Net Settlement Amount for distribution to the Participating Class Members. Accordingly, the Court should award Plaintiffs' counsel their costs.

VII. THE ADMINISTRATOR'S COSTS SHOULD BE APPROVED

Here, Phoenix Settlement Administrators dutifully administered the settlement. (*See generally* K. Lee Decl.) The Settlement Agreement provides up to $6,250.00 for Phoenix Settlement Administrators' costs. (Settlement Agreement ¶¶ 3, 29.) As such, Plaintiffs respectfully requests that the Court award Phoenix its costs.

VIII. NOTICE TO THE LWDA

Plaintiffs provided notice of the proposed settlement to the Labor and Workforce Development Agency ("LWDA") in conjunction with filing their Motion for Preliminary Approval, and will do the same with respect to this Motion for Final Approval. Gavron Decl. ¶ 19.

IX. CONCLUSION

Based on the foregoing, Plaintiffs and Class Counsel respectfully request that this Motion be granted in its entirety and grant Plaintiffs' counsel's fee request of $80,000.00, costs requested in the amount of $15,845.29, and claims administration costs of $6,250.00. The Parties have reached this settlement following extensive litigation, ongoing case discussions, and arm's-length negotiations. Plaintiffs respectfully request that the Court:

1. Grant final approval of the proposed settlement;

2. Order payment from the settlement proceeds to the Claims Administrator in compliance with the Settlement Agreement;

3. Order payment from the settlement proceeds to Class Counsel in compliance with the Settlement Agreement;

4. Order payment from the settlement proceeds to the LWDA in compliance with the Settlement Agreement;

5. Enter the proposed Final Approval Order and Judgment submitted herewith; and

6. Retain continuing jurisdiction over the implementation, interpretation, administration, and consummation of the settlement.

Date: August 4, 2022

FITZPATRICK & SWANSTON
DIVERSITY LAW GROUP

By: _____

B. James Fitzpatrick, Esq.
Larry W. Lee, Esq.
Attorneys for Plaintiffs
SIONE FUAPAU, ALFREDO GODINEZ, GABRIEL MENDOZA, MANUEL VACA, MICHAEL NAU, ANTONIO GUZMAN, JESUS GUERRERO, IVAN PACHECO, and MIGUEL REYES, JR.